FILED
APR 8 1991
OFFICE OF THE CLERK

[illegible] Supreme Court [illegible]

[illegible], et al.,
Petitioners,
v.

ATTORNEY GENERAL OF TEXAS, et al.,
Respondents.

[illegible]

LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, et al.,
Petitioners,
v.

ATTORNEY GENERAL OF TEXAS, et al.,
Respondents.

[illegible] CERTIORARI TO THE UNITED STATES
[illegible] FOR THE FIFTH CIRCUIT

[illegible] STATE RESPONDENTS

[illegible]
Attorney General of Texas
[illegible]
[illegible] Attorney General
[illegible]
[illegible] General
[illegible]
Special Assistant Attorney General
JAVIER P. GUAJARDO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085
Attorneys for State Respondents
*Attorney of Record

April 8, 1991

TABLE OF CONTENTS

	PAGES
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. THE EFFECTS TEST OF AMENDED SECTION 2 DOES NOT APPLY TO STATE JUDICIAL ELECTIONS BECAUSE CONGRESS HAS NOT CLEARLY AND UNEQUIVOCALLY STATED AN INTENT TO EXERCISE ITS ENFORCEMENT CLAUSE POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO REACH STATE JUDICIAL ELECTION SYSTEMS WHICH ARE NOT INTENTIONALLY DISCRIMINATORY	12
II. TEXAS DISTRICT JUDGES HOLD SINGLE-MEMBER OFFICES, AND ELECTING THEM COUNTYWIDE IS NOT A DILUTIVE ELECTORAL PRACTICE COVERED BY AMENDED SECTION 2	37
CONCLUSION	45

TABLE OF AUTHORITIES

Cases:	*Pages:*
Allen v. State Board of Elections, 393 U.S. 544 (1969)	14
Anderson v. Celebrezze, 460 U.S. 780 (1983)	34
Askew v. Hargrave, 401 U.S. 476 (1971)	20
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	21
Chisom v. Roemer, Nos. 90-757 and 90-1032	12
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	20
EEOC v. Arabian American Oil Co., ___ U.S. ___) (March 26, 1991) (No. 89-1838)	35
East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976)	23,29
Edgewood I.S.D. v. Kirby, 777 S.W.2d 391 (Tex. 1989)	32
Forrester v. White, 484 U.S. 219 (1988)	20
Fullilove v. Klutznick, 448 U.S. 448 (1980)	19
Gambill v. Town of Ponder, 494 S.W.2d 808 (Tex. 1973)	4
Georgia State Board of Elections v. Brooks, Civ. No. 288-146 (S.D. Ga. 1989)	34
Haith v. Martin, 618 F.Supp 410 (E.D.N.C. 1985)	34
Herb v. Pitcairn, 324 U.S. 117 (1945)	20
Holshouser v. Scott, 335 F.Supp 928 (M.D.N.C. 1971)	23
Holtzman v. Schlesinger, 414 U.S. 1304 (1973)	24

Hunter v. Underwood, 471 U.S. 222 (1985) 16
Katzenbach v. Morgan, 384 U.S. 656 (1966) 17
Kelly v. Robinson, 479 U.S. 36 (1986) 25
Kremer v. Chemical Construction Co., 456 U.S. 461 (1982) 20
Mandel v. Bradley, 432 U.S. 173 (1977) 34
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 17
Martin v. Hunter's Lessee, 1 Wheat, 304 (1816) 21
McGhee v. Granville County, 860 F.2d 110 (4th Cir. 1988) 29,41
McNeil v. Springfield Park District, 851 F.2d 937 (7th Cir. 1988) 41
Mexican American Bar Ass'n of Texas v. Texas, 755 F.Supp. 735 (W.D. Tex. 1990) 2,31
Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984) 17
Mitchum v. Foster, 407 U.S. 225 (1972) 22
City of Mobile v. Bolden, 446 U.S. 55 (1980) ..... *passim*
Oregon v. Mitchell, 400 U.S. 112 (1970) 17
Pierson v. Ray, 386 U.S. 547 (1967) 20
Reynolds v. Sims, 377 U.S. 533 (1964) 39
Rogers v. Lodge, 458 U.S. 613 (1982) 15
City of Rome v. United States, 446 U.S. 156 (1980) 17
Salve Regina College v. Russell, ___ U.S. ___ (March 20, 1991) (No. 89-1629) 39
Shell Oil Co. v. Iowa Dep't of Revenue, 109 S.Ct. 278 (1988) 24

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 14,18
Stone v. Powell, 428 U.S. 465 (1976) 21
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
Trainor v. Hernandez, 431 U.S. 434 (1977) 19
United States v. Bass, 404 U.S. 336 (1971) 19
Vendo Co, v. Lektro-Vend Corp., 433 U.S. 623 (1977) 22
Voter Information Project, Inc. v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980) 16
Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989) 28
Wells v. Edwards, 347 F.Supp. 453 (M.D. La. 1972) 23
Whitcomb v. Chavis, 403 U.S. 124 (1971) 7
Will v. Michigan Dep't of State Police, 109 S.Ct. 2304 (1989) 19
Yellow Freight System, Inc. v. Donnelly, 110 S.Ct. 1566 (1990) 20
Younger v. Harris, 401 U.S. 37 (1971) 19
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) 23

Statutes and Rules:

28 U.S.C. 2283 21
28 U.S.C. 2284(a) 32
42 U.S.C. 1973 (1982) 2
42 U.S.C. § 1973l(c)(2) 42
42 U.S.C. 1973l(e) 15
42 U.S.C. 1983 20
Tex. Civ. Prac. & Rem. Code § 15.001 4
Tex. Const. art. 5, § 7 5

Tex. Const. art. 5, § 7a(i) 4
Tex. Const. art. 5, § 8 1
Tex. Elec. Code § 172.003 4
Tex. Elec. Code §2.001 4
Tex. Gov't Code § 24.001 5
Tex. Gov't Code § 24.174(a) 2
Tex. Gov't Code § 24.388(a) 3
Tex. R. Civ. P. 330 38

Miscellaneous:

Alozie, *Distribution of Women and Minority Judges; The Effects of Judicial Selection Methods*, 71 SOC. SCIENCE QUARTERLY 315 (June 1990) 28
Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HAST. L.J. 1337, (1980) 22
Dallas Morning News, April 2, 1991 32
Guittard, *Court Reform, Tex. Style*, 21 Sw.L.J. 451 (1967) 3
Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L.R. 173 (1989) 40,45
Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L.R. 1 (1991) 40
N.Y. Times, Jan. 29, 1991 1
Tribe, AMERICAN CONSTITUTIONAL LAW § 5-14 18

This brief is on behalf of the official-capacity state respondents, referred to collectively as either "the state" or "Texas," and who are: the Attorney General of Texas; the Secretary of State of Texas; and the thirteen members of the Texas Judicial Districts Board, including the Chief Justice of the Supreme Court of Texas as chair of the Board.

OPINIONS BELOW

Together, the "Opinions Below" segments of the briefs for the Houston Lawyers' Association petitioners in No. 90-813 ("HLA") and the League of United Latin American Citizens petitioners in No. 90-974 ("LULAC") accurately list the opinions below, except they omit four district court orders entered between the district court's liability determination and its first remedial order. These four orders modify parts of the liability opinion and may be found in the appendix to the state's Memorandum in Response to Petitions for Certiorari, Resp. App. 1a-7a.

STATEMENT OF THE CASE

The plaintiffs' challenge

LULAC originated this case as a challenge to the election of state district judges -- the trial judges of general jurisdiction in Texas, TEX. CONST. art. 5, § 8 -- in over 200 judicial districts in forty-four counties. By trial, the challenge had narrowed to 172 judicial districts -- and 172 judgeships -- in ten counties. The trial was to a one-judge federal district court.

The racial or language minority group lodging the challenge varied by county, as did the number of judicial districts:[1] (a) Black voters only against the 59 judicial

---

[1] The three principal racial and language groupings relevant to this case are Black, Hispanic, and Anglo. "Black" is used in deference to the apparent preference of most Black Americans. *See* N.Y. Times, Jan. 29, 1991, § A, at 19 col. 1 (reporting results of poll of Blacks by Joint Center for Political and

districts in Harris County, the 37 districts in Dallas County, the 23 districts in Tarrant County, and the 8 districts in Jefferson County; (b) Hispanic voters only against the 19 districts in Bexar County and the 13 districts in Travis County; and (c) the combination of Black and Hispanic voters against the 6 districts in Lubbock County,[2] the 4 districts in Ector County, and the 3 districts in Midland County. Statewide, Texas now has 386 state district judges subject to election in 386 judicial districts.[3]

The challengers argued that the Texas system for electing state district judges in the targeted counties violates the United States Constitution and Section 2 of the Voting Rights Act, as amended, 42 USC 1973 (1982). The statutory challenge was brought, tried, and decided

---

Economic Studies). "Hispanic" is used to be consistent with most of the demographic data in the case, even though the overwhelming majority of Hispanics in Texas are Mexican-Americans. "Anglo" is used to denote non-Hispanic whites.

[2] Only 5 districts coincide with Lubbock County's boundaries. One judicial district, the 72nd, encompasses two counties, Lubbock and Crosby. TEX. GOV'T CODE § 24.174(a). Crosby is a tenth targeted county, even though the record in the case sometimes indicates that nine counties are targeted.

[3] Since trial, three new judicial districts have been added in the ten targeted counties, two in Tarrant County, and one in Lubbock County, bringing the number of judicial districts directly involved in this case to 175. Also, four additional district judgeships will be added in Tarrant County if certain preconditions are met at the county level, which would bring the number of Texas state district judges subject to election to 390. This post-trial data is from the record of *Mexican American Bar Ass'n of Texas v. Texas*, 755 F.Supp. 735 (W.D. Tex. 1990) (3-judge court) ("*MABA*"), the private plaintiffs' appeal from which is pending with the Court as No. 90-1352. The *MABA* record also discloses HLA's error in stating that the Attorney General lodged a Section 5 objection to 15 district judgeships created in 1990 Texas legislation. HLA Brief 13 n.15. As he "clarified" in a November 20, 1990, letter, the Attorney General objected to only 9 of the 15 new judgeships. U.S. Br. in *MABA* 6 n.9. The *MABA* district court held that even these nine had been precleared by operation of law.

under the framework for analyzing racial vote dilution challenges to at-large electoral systems established in *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*"). As the Fifth Circuit en banc opinion stated:

> Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength.

Pet. App. 6a.

History and configuration of Texas district courts

Both the use of counties as the basic political unit and the current system of electing district judges have long Texas lineages. County government historically has been the primary governmental unit in Texas since the days of the Texas Revolution in 1836. Tr. 4-138.

As to judicial selection, upon admission to statehood in 1845, the state of Texas retained essentially the same system for appointing district judges to serve in judicial districts that it had as an independent Republic. Guittard, *Court Reform, Texas Style*, 21 SW.L.J. 451, 456 (1967). It moved to elected district judges in 1850 and back to appointed ones in the constitution of 1861. Texas constitutions adopted subsequent to the 1861 constitution, including the current one adopted in 1876, have provided for district judges elected from defined districts. Pet. App. 93a-94a. Since 1907, the defined judicial districts have been contiguous with county boundaries, and there has been only one judge per district. Pet. App. 94a-95a.

Texas district judges are elected from statutorily created judicial districts. *See, e.g.*, TEX. GOV'T CODE § 24.388(a) (creating the 209th Judicial District in Harris

County). The judicial districts must be contiguous with county lines unless, through a thus far untapped exercise of their franchise, county voters authorize a judicial district smaller than a county. TEX. CONST. art. 5, § 7a(i). With the exception of the 72nd district, each judicial district in the targeted counties is coextensive with one county, and state district judges are elected by countywide vote in general elections.

The county also forms the basic venue unit for district courts. TEX. CIV. PRAC. & REM. CODE § 15.001.[4] With the backdrop of the county as the basic electoral and venue unit, the Chief Justice of the Supreme Court of Texas testified about trial judge accountability. His view was that a district judge should not be responsible to the voters of an area any smaller than the one in which the judge exercises primary jurisdiction. Tr. 5-78. *See also* Pet. App. 282a.

Judicial election and eligibility

Texas elects its district judges in partisan races conducted at the same time as other state partisan races.[5] Political parties nominate judicial candidates in general primaries and runoffs. A candidate must receive a majority of the vote to be the party's nominee at the general election. TEX. ELEC. CODE § 172.003. The winner of the plurality of the votes at the general election is elected to the office of district judge. TEX. ELEC. CODE § 2.001. Thus, one set of judicial elections, the party

---

[4] Some Texas venue provisions are mandatory, to the point of being jurisdictional, and some are permissive. *See generally Gambill v. Town of Ponder*, 494 S.W.2d 808, 809-11 (Tex. 1973). Regardless, the county remains the touchstone.

[5] HLA mistakenly states that judicial elections are conducted at the same time as municipal elections. HLA Brief 7, 43.

primaries, has a majority vote requirement and the other, the general election, does not.

LULAC and HLA principally targeted general elections, not primary elections. The only party primaries targeted were the Democratic party primaries in Travis and Jefferson counties.[6]

Texas district judges serve four year, unevenly staggered terms. TEX. CONST. art. 5, § 7.[7] The state constitution establishes minimum eligibility requirements for district judges: (a) they must be citizens of the United States and Texas; (b) they must be licensed to practice law in Texas and have been a practicing lawyer or a Texas court judge or both combined for four years at the time of election; and (c) they must reside in the district for two years at the time of election. *Id.* They must be at least twenty-five years old. TEX. GOV'T CODE § 24.001.

The pool of Black and Hispanic lawyers eligible to be district judge is proportionately far smaller than the pool of Black and Hispanic voters eligible to vote for district judge. A trial comparison by county and by the type of voter challenge -- Black, Hispanic, or combined -- reveals the following:[8]

---

6 The district court's interim remedy did not tailor relief to the type of targeted election (primary or general); instead, it dissolved the distinction by ordering relief sought by no plaintiff: non-partisan judicial elections. J.A. 164a.

7 The district court's stayed interim remedial order illustrates the unevenness of the staggering of terms. Of the then-172 judgeships under challenge, the interim order would have affected 115 judgeships which were open for election in 1990, including 32 of the 37 in Dallas County. J.A. 163a.

8 The eligibility minority lawyer percentages are from a poll whose results are tabulated in Table 2 of State Exh. D-4. The eligible voter percentages are taken from the district court's findings, Pet. App. 200a-208a, adjusted to account for non-citizens who are voting age in Travis, Lubbock, Ector, and Midland counties, which adjustment is derived from LULAC Exh. Tr-18, L-11, E-13, and M-15.

County (Minority)	% Eligible Minority Lawyers	% Eligible Minority Voters
Harris (Black)	3.8	18.2
Dallas (Black)	1.0	16.0
Tarrant (Black)	2.4	10.4
Bexar (Hispanic)	11.4	41.1
Travis (Hispanic)	2.7	13.5
Jefferson (Black)	3.1	24.6
Lubbock (Combined)	5.1	14.9
Ector (Combined)	3.7	16.0
Midland (Combined)	3.4	10.6

With few exceptions, Texas district judge elections are low profile and issueless. District judge races typically appear low on a ballot that already lists more races than most other states. Tr. 5-182.[9] The voters display little knowledge or interest in the comparatively few contested judicial elections. Straight ticket party voting is permitted, and a high percentage of votes are cast for district judges using straight ticket voting.[10] In

---

9 Because vacancies are filled by gubernatorial appointment, special elections never occur for district judges. The consequence is that district judge elections always are buried low on a ballot that can include races for President, Vice-President, United States Senate, United States Congress, Governor, Lieutenant Governor, Attorney General, Comptroller, Land Commissioner, Agriculture Commissioner, Railroad Commissioner(s), Supreme Court Justices, Court of Criminal Appeals Justices, State Board of Education member, Court of Appeals Justices, State Senator, State Representative, County Court at Law Judge, Justice of the Peace, County Judge, County Commissioner, County Clerk, District Clerk, County Treasurer, Constable, and other county offices.

10 The district court observed:

> It was brought to the Court's attention that perhaps a majority of the voters in a General Election, and for that matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular political party.

Pet. App. 188a.

Harris County in 1980, for example, a study found that 90% of Republican voters, 89.3% of Democratic voters, and 98% of the voters in predominantly Black precincts cast straight party votes in judicial races. Tr. 5-228.

District court liability decision

The trial court in this case rejected the constitutional claims of LULAC and HLA, finding that the Texas system for electing its district judges is not maintained as a tenuous pretext for discrimination. Pet. App. 283a. It also found that LULAC and HLA had not established intentional racial discrimination in Texas's establishment and maintenance of its judicial election system. Pet. App. 302a. This determination went unappealed.

The trial court did find unintentional racial vote dilution in the challenged judicial districts in all the targeted counties and a consequent violation of the effects, or results, standard of amended Section 2; however, in doing so, it specifically rejected principles of voting rights analysis announced by the Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) ("*Chavis*"). Pet. App. 287a ("[p]arty affiliation is simply irrelevant" in analyzing racial bloc voting patterns); 298a ("not . . . legally competent evidence").[11]

---

[11] The import of Texas's *Chavis* argument for *Gingles*-style racial polarization analysis is accurately summarized in the district court's liability decision, *see* Pet. App. 286a, which nonetheless is factually skewed by the rejection of *Chavis*. The picture of racially polarized patterns is fundamentally different when viewed from the perspective of *Chavis*-based facts instead of *Chavis*-rejecting facts. The difference when partisan voting patterns are factored into the analysis is illustrated by the situation in Dallas County. There, during the 1980's, Democratic judicial candidates (regardless of their race) lost, and Republican judicial candidates (regardless of their race) won. Tr. 4-99, 4-101, 5-193--5-194 (also noting the one anomaly attributable to the Democratic candidate's name being the same as a longtime local media personality. LULAC's expert acknowledged a stronger association between the party of a judicial candidate and electoral success than between the race of the candidate and

Finally, the district court found Texas district judges to be "sole, independent decision makers," but attached no legal significance to it in light of then-prevailing Fifth Circuit law. Pet. App. 289a n.32.

Fifth Circuit en banc opinions

In its en banc consideration of the case, the Fifth Circuit voted twelve-to-one to reverse the district court and render judgment against LULAC and HLA. By a seven-to-six majority, the court held that the results test of amended Section 2 is inapplicable to judicial elections. Pet. App. 1a-35a.

In a concurring opinion by Judge Higginbotham, five members of the court (one of whom also voted with the majority) adopted the principle that there can be no unintentional vote dilution in elections for officials who are solo decisionmakers holding single-member offices. Pet. App. 90a-114a.

One member of the court, Chief Judge Clark, joined in no other opinions but specially concurred in the result, Pet. App. 36a-46a, reasoning that Texas has a "fundamental right" to choose to have judges elected who serve "the same jurisdictional area as that which defines the electorate," *id.*, 39a, 44a. Judge Johnson alone dissented from the decision to reverse and render judgment, Pet. App. 115a-182a, although he would not have affirmed the interim remedial order's requirement that judicial elections under it be nonpartisan, *id.*, at 163a n.25.

---

electoral success. Tr. 2-147. He would prefer to know the party of the candidate over the race of the candidate to predict the outcome of a Dallas County judicial race. Tr. 2-149.

SUMMARY OF ARGUMENT

Coverage

The meaning and reach of the 1982 amendments to section 2 of the Voting Rights Act are the focus of this case; however, the plain meaning of the statute is not the issue to be confronted.

The issue the Court must confront is whether Congress has exercised its authority under the Enforcement Clauses of the Civil War Amendments -- specifically, the Fourteenth and Fifteenth Amendments -- to prohibit state action that does not violate the Constitution standing alone. Congress may not exercise its enforcement authority consistent with the venerable doctrine of judicial review unless it actively employs its special factfinding competence and determines that constitutional guarantees announced by the Court are being underenforced in a particular way in a particular setting.

Congress amended section 2 to institute a statutory effects standard in reaction to *City of Mobile v. Bolden.* One of the principles established by the Bolden plurality was that the original section 2 reached no further than the Constitution.

There is virtual unanimity among the parties that Congress gave virtually no thought to state judicial elections during the amendment process. The Court, however, has conditioned the constitutionality of congressional employment of its enforcement powers under the Fourteenth and Fifteenth Amendments on Congress's doing precisely what it did not do in 1982 with regard to state judges: that is, deliberating carefully over whether the facts and conditions in the states warrant a particular statutory response from Congress.

The state action here is not just any state action; it is Texas's choice about how to select its courts of primary jurisdiction. There is no function more at the core of a state's authority to choose its system of governance than the judicial function. The fundamental nature of federalism is to protect such a core state function, yet the challengers urge upon the Court a reading of the Voting Rights Act which permits federal courts to order a fundamental restructuring of Texas's trial judiciary. Federal and state courts have a long history of independent operation and existence, as well as interdependence, which would be seriously threatened by the authority the challengers would have the Court find in the effects test component of amended section 2.

Springing from the constitutionally-based constraints on congressional action imposed by the doctrine of judicial review and the basic concept of federalism is the principle of statutory construction which requires Congress to clearly and unequivocally express its intention to use its Enforcement Clause powers to permit the compelled restructuring of state judicial selection systems.

There is no clear statement in either amended section 2 or its legislative history of Congress's intent to target state judicial systems in the 1982 amendments to section 2 of the Voting Rights Act. Thus, the effects arm of amended section 2 does not reach state judicial systems.

Solo decisionmaker

Even if the amendments extended the effects test to state judicial systems, Texas's system for electing its district judges does not violate the vote dilution prohibition embedded in amended section 2. The district judges are solo decisionmakers.

The theoretical concept of vote dilution, amorphous though it be, is inapplicable to at-large systems for electing public officials who function as solo decisionmakers. Other types of section 2 claims might be established, but other types of claims were not lodged here. The case was tried and decided under the *Thornburg v. Gingles* framework, which applies only to at-large vote dilution cases.

At-large vote dilution claims cannot be established against electoral systems electing solo decisionmakers because permitting them would threaten the state's choice of the basic unit to be represented by any given official arm of its government.

Thornburg v. Gingles establishes single member districts as the remedy that must be used as the paradigm in the first step of the liability phase of a vote dilution case. The unit represented by solo decisionmakers is a choice for the state to make. Carving such a unit into single member districts destroys the choice and splinters the state's fundamental political framework when solo decisionmakers are involved, although not when collegial decisionmakers are.

ARGUMENT

I.

THE EFFECTS TEST OF AMENDED SECTION 2 DOES NOT APPLY TO STATE JUDICIAL ELECTIONS BECAUSE CONGRESS HAS NOT CLEARLY AND UNEQUIVOCALLY STATED AN INTENT TO EXERCISE ITS ENFORCEMENT CLAUSE POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO REACH STATE JUDICIAL ELECTION SYSTEMS WHICH ARE NOT INTENTIONALLY DISCRIMINATORY

The United States is, in a sense, quite correct in observing that the crucial clue in this case is that "the dog did not bark." U.S. Br. 32., *Chisom v. Roemer*, Nos. 90-757 and 90-1032. The silence is precisely the problem. There *must* be a distinct bark from Congress before it may so fundamentally alter the relationship between the state and federal systems of justice.

The Necessity of a Clear Statement from Congress

The central question is not whether Congress *may* exercise its enforcement authority under section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment to outlaw unintentional racial vote dilution in elected state judicial systems, such as Texas's, which have been determined to be constitutionally maintained.[12] Instead, the question is whether Congress *has* done so. The questions, however, are linked. Answering the second question posed here requires consideration of the basis for an affirmative answer to the first one.

---

[12] The district court's finding that Texas's district judge election system is constitutional is now unchallenged. *Supra*, at 7.

The linkage between the two questions finds expression in the clear statement rule of statutory construction. In the setting of this case, the rule means that Congress must have clearly and manifestly expressed its intention in amended section 2 or its legislative history to intrude into the sphere of state judicial autonomy by extending section 2 to reach beyond the intent of state action to the effect of state action. Amended section 2's broad antidiscrimination language reveals no such intent, and the legislative history, devoid of even the slightest reference to judicial elections, indicates there was none.

Thus, the clear statement rule, with its roots in constitutional requirements of judicial review and related constraints of federalism, leads to the conclusion that amended section 2 does not cover judicial elections when the effects test is the only basis for liability. After more than a century of arguable constitutional power to do so, Congress in 1982 did not use its enforcement authority under the Fourteenth and Fifteenth Amendments for a fresh intrusion -- through the effects test -- into a core area of state autonomy.

The analysis of why the Court must draw this conclusion, and affirm the judgment of the Fifth Circuit,[13] requires a review of the basis for the clear statement rule in the context of the challenge lodged in this case and a canvass of section 2's development since its inception in 1965, when the original Voting Rights Act ("the Act"), Pub. L. No. 89-110, 79 Stat. 437, was passed.

---

[13] Texas urges a different ground for affirmance than the one forming the basis for the Fifth Circuit's en banc majority opinion.

Sources of the Clear Statement Rule

The constraints imposed by the doctrine of judicial review and the Enforcement Clauses of the Civil War Amendments

Amended section 2 outlaws state action which this Court has held does not violate either the Fourteenth or Fifteenth Amendment. It outlaws unintentional but effective discrimination, whereas the Constitution outlaws only intentional discrimination.

The original section 2 was "an uncontroversial provision." *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality opinion) ("*Bolden*"). It was the Act's other provisions which "engendered protracted dispute." *Id.* Indeed, in contrast to the "sparse legislative history" of section 2, *id.*, at 60-61, the other provisions received extended congressional attention before passage of the Act, including extended congressional floor debate. *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966) ("*South Carolina*").

The Court did not have section 2 before it in *South Carolina*, though it did remark that the provision "broadly prohibits the use of voting rules to abridge the exercise of the franchise on racial grounds." 383 U.S. at 316; *see also Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969) ("*Allen*"). *Bolden*, though, explained that, however sparse, section 2's legislative history clearly demonstrated that section 2's reach was coextensive with the Fifteenth Amendment. 446 U.S. at 61.[14]

Section 2 was unaffected by the Voting Rights Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; however, Section 206 of the 1975 amendments to the

---

[14] The original section 2's unexceptionable reach undoubtedly accounts for the spare legislative history.

Act, Pub. L. No. 94-73, 89 Stat. 400, brought language minority citizens within the ambit of section 2. Section 207 of the 1975 amendments defined persons "of Spanish heritage" to be language minority citizens.[15]

The 1975 amendments also contained some confirmation of the accuracy of the *Bolden* plurality's reading of the reach of section 2.[16] Section 402 of the amendments added subsection (e) to Section 14 of the 1965 Act to provide attorney fees to the prevailing party in lawsuits "to enforce the voting guarantees of *the fourteenth or fifteenth amendment*[.]" (emphasis added).[17]

The *Bolden* plurality's conclusion that the Fifteenth Amendment required proof of discriminatory intent in racial vote dilution challenges to at-large electoral systems meant that section 2 also required such proof. Stated another way, *Bolden* meant that the antidiscrimination principle embodied in the original section 2 "added nothing" to preexisting constitutional protections. *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982). Section 2 became a substantive irrelevancy as

---

15 The 1975 amendments also brought Texas and its political subdivisions under the Act's preclearance requirements.

16 See discussion *supra*, about section 2 extending no further than the Constitution.

17 The attorney fee provision, codified as 42 USC 1973*l*(e), was not amended in 1982, when section 2 was. Thus, Congress has not exercised its enforcement powers under either section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment to extend the attorney fee provision to section 2 cases resting on the effects test to establish liability. Section 14(e), then, does not reach as far as amended section 2. The *Bolden* plurality would seem to compel the conclusion that statutory attorney fees are available only when voting rights liability rests on proof of intentional discrimination -- which this case does not.

long as it and the Fifteenth Amendment remained unchanged.[18]

Congress reacted to *Bolden* by amending section 2. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, § 3. The principal objective of the amendment was to add an effects test as an alternative to the intent test for determining whether the provision had been violated. This partial legislative uncoupling of section 2 from the Constitution, under the authority of the congressional enforcement sections of the Fourteenth and Fifteenth Amendments, breathed life for the first time into the Voting Rights Act's basic antidiscrimination prohibition.

For more than a century, the people through their Constitution had acknowledged the illegality of intentionally discriminatory, race-based state action. As long as the federal declarations of illegality (be they legislative or judicial) were intent-based, the people of the states had consented to federal intrusions into what would otherwise have been constitutionally protected spheres of state autonomy. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating racially based state constitutional disenfranchisement provision and explaining that "the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment"). With its move from intent to effect as the standard for measuring challenged election systems, Congress introduced a major alteration between the federal government and the states.

---

[18] Indeed, *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980) ("*Voter Information Project*"), decided shortly before *Bolden*, is proof of the original section 2's irrelevancy in a case with special pertinence to the issues here: a racial vote dilution challenge to an at-large system for electing judges. Section 2 is not even mentioned in the opinion, which is premised on the Fourteenth and Fifteenth Amendments.

Principles of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), however, limit congressional power to alter the Court's determination of the Constitution's reach. In a case concerning section 5 of the Voting Rights Act, the Court upheld Congress's authority under section 2 of the Fifteenth Amendment to prohibit state action that has a discriminatory impact. *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980) ("*City of Rome*").[19] Earlier voting cases addressed at some length the principles governing legislation enacted pursuant to the congressional enforcement provisions of the Fourteenth and Fifteenth Amendments. *See Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, *supra*.

The empirical premise for upholding congressional power in these cases is the superior fact-finding abilities of the legislative body. *See, e.g., Katzenbach v. Morgan*, 384 U.S. at 656 (referring to "specially informed legislative competence"). Justice Brennan's opinion (joined by Justices White and Marshall) in *Oregon v. Mitchell* re-emphasizes the necessity of deference to legislative fact-finding in the judicial review of congressional action under the Enforcement Clauses of the Civil War Amendments. 400 U.S. at 246-50. Justice Black's opinion in the case took a similar view, emphasizing the need for "legislative findings" when Congress seeks to use the Enforcement Clauses to "invade an area preserved to the States." *Id.*, at 130.

This premise about congressional fact-finding competence leads one of the foremost constitutional

---

[19] In the context of a congressional redistricting challenge, the Court has summarily affirmed the constitutionality of the addition of the effects test to section 2. *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), *aff'g*, 604 F.Supp. 807 (N.D. Miss.) (3-judge court).

scholars to predict that when and if the question of the constitutionality of the 1982 amendments to section 2 comes before the Court for plenary review, the supporters of amended section 2 will seek to uphold it on Congress's "fact-finding abilities" to determine that racially disproportionate effects cloak intent. L. Tribe, AMERICAN CONSTITUTIONAL LAW § 5-14, at 340 (2d ed. 1988). These fact-finding abilities, so critical to the constitutional validity of amended section 2, also are the underpinning for the requirement of a clear statement in connection with the kind of legislation before the Court.

If Congress is to use its specially informed competence at fact-finding to constitutionally justify legislation encroaching on traditional state domains in ways the constitution, standing alone, does not, then it must be concluded that the legislative encroachment has not occurred if the fact-finding ability has not been exercised regarding a given state domain. Otherwise, the legislative activity legitimating the legislative act of intruding into a state domain when the Constitution standing alone has not done it is absent. Its absence deprives the legislative act of its constitutional basis.

Thus, when Congress acts pursuant to its Fourteenth and Fifteenth Amendment enforcement authority, the statute and its relevant legislative history must manifest congressional deliberation over the reason for intruding into the states' domain. Congressional awareness and deliberation, not inadvertence, is a constitutional necessity in this context:

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

Enforcement legislation pursuant to Congress's constitutional powers under the Civil War Amendments must reflect "a considered decision of the Congress[.]" *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (plurality opinion). In this area, at any rate, Congress may not legislate in a vacuum through inattention.

Federalism constraints

The other constraint underpinning the requirement of a clear statement of congressional intent in this arena of activity is related to the one just discussed; however, the emphasis shifts from the federal level to the state level and the particular state domain purportedly targeted by the federal actor. Its origins are kin to the concept of "Our Federalism" explained in Justice Black's sweeping language:

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Younger v. Harris, 401 U.S. 37, 43 (1971); *see also Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (stressing the importance of federalism principles, "particularly with the operation of state courts").

The Court's concern that state judicial functions receive special insulation (but not immunity) from federal encroachments finds expression in numerous judicially-developed doctrines. To give federal courts exclusive jurisdiction over a federal cause of action, Congress must affirmatively divest state courts of their presumptively

concurrent jurisdiction. *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566, 1568 (1990).

To avoid trenching upon basic tenets of comity and federalism, Congress must "clearly manifest" its intent to deprive state court judgments of finality when enacting federal remedial legislation. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 477-78 (1982). To protect the independent role of the state judiciary, the presumption is that Congress would have specifically abolished the doctrine of judicial immunity from damages under 42 USC 1983 if it had intended to do so. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). Even when permitting federal legislation to reach judges without explicitly stating that it was doing so, the Court has been careful to insulate the judicial function from the reach of federal legislation. *See Forrester v. White*, 484 U.S. 219 (1988) (permitting § 1983 damages recovery for gender discrimination from state judge in his capacity as administrator, not judge).

These doctrines undoubtedly spring from crucial role played by state courts in administering justice in an interdependent federal system. State courts, of course, develop doctrines of state law to which federal courts must defer in a variety of ways. Lower federal courts lack the power to review state court decisions. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Even this Court is constitutionally disabled from reviewing state court decisions if they rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Sometimes, federal courts must abstain even from deciding cases within their jurisdiction to await state court resolution of unsettled state law questions. *See, e.g., Askew v. Hargrave*, 401 U.S. 476 (1971). State courts also function alongside the federal courts in deciding questions of federal law. *See, e.g., Stone v.*

Powell, 428 U.S. 465, 493 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law[.]" citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-44 (1816)).

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) ("*Atlantic Coast Line*"), is an exposition of why the synthesis of these doctrines is the Court's requirement that Congress clearly and manifestly indicate its intent to intrude into state judicial functions before such intrusion may be held to occur. Observing that one of the powers reserved to the states was the maintenance of state judicial systems, the Court stated:

> [F]rom the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other . . . .

398 U.S. at 285-86.

Construing the reach of the Anti-Injunction Act, 28 USC 2283, the Court noted that the act's protection of state courts rested partially on "the fundamental constitutional independence of the States and their courts[.]" *Id.*, at 287. Then, the Court established the standard that must guide the Court in this case is construing amended section 2:

> *Any doubts* as to the propriety of a federal injunction . . . should be resolved in favor or permitting the state courts to proceed in an orderly fashion. . . . The explicit wording of § 2283 itself implies as much, and *the fundamental principle of a dual system of courts leads inevitably to that conclusion.*

398 U.S. at 297 (emphasis added).[20]

---

[20] Echoing the *Atlantic Coast Line* principle, a commentator has remarked: "It is difficult to conceive of a state function more integral than dispute resolution

The Court has not receded from these federalism-based principles of statutory construction when federal court impingement on state judicial functions is at issue. *Mitchum v. Foster*, 407 U.S. 225 (1972), held that section 1983 was an exception to the Anti-Injunction Act, but it used the *Atlantic Coast Line* standard. As explained by Chief Justice Rehnquist's plurality opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 634 (1977), the absence of express statutory language in *Mitchum v. Foster* was "cured by the presence of relevant legislative history." There is no such cure in the legislative history of amended section 2.

Clear statement rule: Confluence of Federalism and Judicial Review

Thus, principles of both federalism and judicial review underly the requirement of a clear statement here, a requirement that is at its most intense when the purported federal intrusion is into the core of the state's domain, its judicial system. In amending section 2, Congress clearly intended to extend the effects test to state-level executive and legislative functions. From all that can be discerned from the authoritative sources, the thought of state judicial systems simply did not surface in the collective conscience of Congress.

Legislative history of amended section 2

There is no indication that Congress envisioned the major alteration of outlawing unintentional discriminatory effects to extend to the relationship of the federal government to state judicial systems. More particularly, there is no hint of congressional awareness that it might

---

through a court system." Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HAST. L.J. 1337, 1349 n.74 (1980).

be fundamentally altering the two-century long coexistence of "two essentially separate legal systems," *Atlantic Coast Line*, 398 U.S. at 286, by empowering one (the federal system) to fundamentally restructure the other (state systems) for unintentionally discriminatory state action.

Nothing in the relevant legislative history suggests that Congress even remotely contemplated judicial elections when it was inserting an effects test into section 2. The Court recognizes the Senate Report accompanying the 1982 amendments as an "authoritative source" for interpretive guidance for section 2. *Gingles*, 478 U.S. at 43 n.7. The report extensively canvasses pre-*Bolden* racial vote dilution case law. Challenges to virtually every conceivable governmental body are listed and discussed: state legislatures; county commissioners; cities; and school boards. All these governmental bodies are either legislative or executive. Nothing is said about judicial elections, and the only reported pre-*Bolden*, pre-amended section 2 judicial vote dilution case, *Voter Information Project*, *supra* note 18, is neither cited nor discussed.[21]

Try as they might, the petitioners and their *amici* can find nothing in the relevant legislative history indicating that Congress contemplated that its 1982

---

[21] Nor are the pre-*Bolden* cases holding that the one-person one-vote principle is inapplicable to judicial electoral systems, *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972) (3-judge court), *aff'd*, 409 U.S. 1095 (1973), and *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (3-judge court), *aff'd*, 409 U.S. 807 (1972). The Congressional understanding was that the concept of racial vote dilution is linked to the one-person one-vote anti-dilution principle, hence the Senate Report's use of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), which itself linked the two concepts. 485 F.2d at 1303. Thus, Congress's failure to even mention these two Supreme Court summary affirmances further validates a point that seems obvious: Congress was not thinking about judicial elections when it amended section 2.

ensconcement of an effects test into section 2 swept within its scope elected state judges.[22] In fact, their briefs support the very proposition urged here by Texas. They acknowledge that there was not a single reference "anywhere in the legislative history of the 1982 amendments" to any of the pre-1982 amendment cases holding that the one-person one-vote principle is inapplicable to judicial election systems. HLA Br. 41 n.27, *Chisom v. Roemer*.

In an even more significant admission, they also acknowledge that there was only one explicit statement during congressional consideration of the 1982 amendments "regarding the coverage of judicial elections under section 2[.]" *Id.*, 41 n.26. The statement itself is at best an oblique reference to judges, mentioning "judicial districts" in a "cautionary parade of horribles to be found in subcommittee report hostile to the proposed 1982 amendments." Pet. App. 30a.[23] The statement was made by Senator Hatch, a staunch *opponent* of the amendment. It means virtually nothing in discerning the effects arm of amended section 2, because opposition statements carry "relatively little weight" in discerning a statute's meaning. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 (1973); *see also Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988).

---

22 The legislative history of the 1965 Act and the 1970 and 1975 amendments, even were the petitioners able to find indications of an intent to cover elected judges, say nothing about the intent behind the 1982 amendments and whether the effects test covers judges. The original Act and the two earlier amendments were pre-*Bolden* and, therefore, concerned only the intent standard for section 2. That earlier legislative history, therefore, is irrelevant to the issue currently before the Court.

23 Even a glancing reference to judicial districts does not necessarily constitute a reference to judges. *See* Pet. App. 31a n.14 (in the region covered by the Fifth Circuit, officials such as sheriffs, highway commissioners, district attorneys, and clerks of court are elected from judicial districts).

The only other part of the legislative history with even scant reference to judges is found scattered in oblique references through the extensive congressional hearings. The meager collection of references is in Judge Higginbotham's concurrence. Pet. App. 67a-68a. The little that is there adds nothing. Witness statements in hearings which are not included in official congressional reports (as these were not) are accorded no significance in determining the meaning and reach of a statute. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

Congressional silence and inattention

The watchdog is silent when judges pass by. Congress never focused on judges. It thus did not make the fact findings or give the careful consideration to the consequences of bringing elected judges within the reach of section 2's effects test which is constitutionally demanded in the proper exercise of its enforcement authority under the Fourteenth and Fifteenth Amendments. Instead, it devoted its attention to restoring its view of the pre-*Bolden* case law -- case law that does not include one single statutory vote dilution case involving judges.

A fair reading of this history can only lead to the conclusion that is implicitly suggested by the recent flowering of judicial vote dilution challenges. Congress never seriously thought about judges when it was amending section 2, and never having seriously thought about the matter, it did not intend to cover it. Judicial elections simply never surfaced as a congressional concern in this delicate and contentious area of the law.[24]

---

[24] That Congressionally-ordained intrusive restructurings of state judicial selection methods are strange paths hidden from notice by Congressional travelers is illustrated by a consideration of the status of non-elective state judicial systems. The Fourteenth Amendment proscribes intentional racial discrimination in the *appointment* of state judges, as well as in the *election* of

The Unjoined Debate on Judicial Coverage

Had Congress thought about it, there would have been much to discuss in connection with whether the effects test for racial discrimination in voting should be extended to elected state judicial systems. The absence of *any* discussion of *any* of these points is mute, and therefore compelling, testimony to the absence of congressional intent to extend amended section 2 to elected judges.

No prior decisional guidance on the effects test and judges

To support the decision to add a results test to section 2, the authoritative Senate Report stated:

> The "results" test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions. This test will provide ample guidance to federal courts when they are called upon to review the validity of election laws and procedures challenged under Section 2.

S. Rep. No. 97-417, p. 16 (1982). Judicial elections *are* different and the role played by those elected in them is fundamentally different than the kinds of elections and elected officials to which racial vote dilution principles had been applied when the 1982 amendments were passed.

The only racial vote dilution case involving judges, completely unnoticed by Congress in 1982 (or any other time, for that matter), *Voter Information Project*, was on

---

state judges, but Congress never has exercised its enforcement powers under section 5 of the amendment to statutorily prohibit such actions.

its face an intentional discrimination case and came to the Fifth Circuit on upon the grant of a motion to dismiss. Thus, there had been no factual test of such a case in the courts by the time Congress acted, and its confidence in the standard having been "well defined" would not have been so strong, had it thought about judges and how they are different.

Envisioning the debate that would have occurred had Congress been concerned about judges adds confidence to the conclusion that the coverage is not there. The major elements of the debate that never occurred are canvassed below.

The troublesome inapplicability of one-person, one-vote

The inapplicability of the one-person one-vote principle in judicial elections would have given Congress pause. The standard for evaluating a vote dilution challenge using the effects test is not apparent when the one-person one-vote principle is inapplicable. As Justice O'Connor analyzed it in *Gingles*:

> In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of "undiluted" minority voting strength.

478 U.S. at 88 (J. O'Connor, concurring).

The yardstick adopted in *Gingles* -- a calculation of the minority's potential voting strength in a single-member district -- assumes the applicability of the one-person one-vote rule and that each district has approximately the same population. 478 U.S. at 50-51 n.17, 89-90. Otherwise, the Court would have no articulable standard. The majority opinion below found this a persuasive argument for not applying the amended

section 2 effects test to judicial elections. Pet. App. 20a-23a. Whether Congress would agree is, up to this point anyway, unknown.

The implications of a different eligible pool for judges

Judicial candidates typically must meet more onerous eligibility requirements than other types of candidates for public office. They must in Texas. *Supra* at 5. Such requirements for judges skew the proportions between the eligible pool of candidates and the eligible pool of voters to a dramatically different degree than exist for other public offices. *See* table, *supra* at 6.[25] In other statutory settings, the Court has interpreted congressional legislation to require lower courts to take eligible pool differentials into account. *See, e.g., Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121-22 (1989) (Title VII employment case). Whether Congress would adjust the effects test standard to account for this difference with judges is unknown and undebated.[26]

---

[25] A recent social science article examining the underrepresentation of minorities in the judiciary concludes that the best indicator of the number of minority judges, both Black and Hispanic, on the bench is not the selection method; it is the number of minority lawyers in the area. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCIENCE Q. 315 (June 1990).

[26] The United States acknowledges the force of this kind of argument about the uniqueness of courts, terming the uniqueness argument "a powerful one." U.S. Br. 34, *Chisom v. Roemer*. It then relegates the concerns it raises to section 2(b)'s "totality of the circumstances" which the courts must consider in determining whether a violation has been established. There is not the slightest indication that such was Congress's intention, and, assuming that Congress properly exercised its constitutional enforcement authority by specifically addressing the circumstances it wished to legislatively correct, there is not the slightest indication that it did so. That is, it did not address the uniqueness of courts and make that uniqueness part of the totality of the circumstances to be considered; it simply did not address the matter at all.

Judicial independence and alternative voting mechanisms

HLA struggles mightily to finesse a concern about judicial independence and respect for basic state choices which arises in connection with the preferred section 2 remedy -- single member districts. It posits alternative voting mechanisms -- at-large cumulative and limited voting mechanisms -- that the court (or the parties) might use if the remedy stage of a vote dilution case were reached. HLA Br. 57-60.[27] HLA's concern is legitimate, and its solution may be a creative, useful one. It just happens, though, that Congress never thought about it, and Texas election law does not contemplate it. In amending section 2 in 1982, Congress left completely untouched this Court's stated preference for single-member districts as the court-ordered remedy for vote dilution violations, absent unusual circumstances. *See East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 639-40 (1976).

No court has ever upheld a trial-court imposed remedy of cumulative or limited voting in a vote dilution case. The only reported case in which such a court-ordered alternative remedy was imposed culminated in appellate reversal. *See McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988) (rejecting district court-imposed limited voting remedy in at-large racial vote dilution case, in part because of its inconsistency with section 2(b)'s proviso disclaiming a section 2 right to proportional representation, *id.*, at 119-20).

---

[27] Even with the use of such alternative mechanisms in Harris County, smaller-than-countywide judicial districts or subdistricts would have been necessary.

Thus, while HLA's alternative remedy proposal may be one that Congress should consider in connection with determining whether and how judicial elections should be brought within section 2's coverage, it is not one that Congress has considered. Instead, it amended section 2 against a backdrop that included the strong single-member remedial preference, and nothing in the legislative history called the preference into question.

Constitutional freedom to appoint, instead of elect, judges

The Fifth Circuit concluded that the effects arm of amended section 2 does not reach elected state judges "for the cardinal reason that judges need not be elected at all[.]" Pet. App. 2a-3a. This rationale, in turn, rested on the court's view that an appointive state judiciary is permissible notwithstanding the guarantee in Article 4, Section 4, of the United States Constitution of a "Republican Form of Government" to the states. Pet. App. 25a-26a n.13.

Effective denial of state freedom to restructure its judiciary

Another region unexplored by congressional consideration and debate is the practical impediments section 2 "effects" coverage of judges might place on the states' otherwise wide-ranging choice of judicial selection methods. In Texas, for example, the practical result of section 2 "effects" coverage and the district court's factual analysis would be that Texas is effectively foreclosed in the foreseeable future from choosing on its own to move from an elective to an appointive judicial selection system. As chronicled in the record of the *MABA* appeal now pending before the Court on a jurisdictional statement, the United States attempted to prohibit even

the addition of new judgeships to the existing system. The principal reason it offered was that the existing structure violated section 2.[28] *Allen, supra*, made clear that section 5 of the Act covered a change in the nature of an office from elective to appointive, necessitating the Act's preclearance procedures.

Given the views articulated by the United States in *MABA*, it is clear that Texas would be unable to choose to select its judges through appointment because the United States would never preclear the choice, even though it is a constitutionally permissible one. Congress has never confronted the ramifications of this result, which, given Article 4, Section 4, of the Constitution, appears to be unique to state judiciaries.

Thus, Congress has never debated: first, the consequence of permitting federal courts, based on unintentionally discriminatory state action, to compel through section 2 the restructuring of state judiciaries; and, second, the ensuing consequence of prohibiting through section 5 the states' independent efforts to restructure their own judiciaries in otherwise constitutionally permissible ways. The subject is worthy of debate, and it is predictable that one would have been engendered -- had the subject crossed Congress's mind.

The relationship of 3-judge courts to judicial election challenges

Finally, because Congress never considered whether it was reaching judicial elections through amended section 2, it also never considered whether it should expand its three-judge court requirements to cover

---

[28] The United States even took the remarkable view that it was not bound, even in Texas, by the Fifth Circuit judgment on section 2's reach which is before the Court in this case. See Pet. App. 307a.

challenges to statewide judicial districting. Under 28 USC 2284(a), a three-judge court must be convened "when an action is filed challenging . . . the apportionment of any statewide *legislative* body." (Emphasis added). The district court in *Gingles* was a three-judge court, 478 U.S. at 35, but the one here was not. Yet, the statewide impact here was just as great, and the affected state institution at least as significant -- if not more so, from a federalism perspective. When Congress contracted the number of circumstances requiring three-judge courts, *see* 90 Stat. 1119, it retained § 2284(a) because the circumstances listed there "are of such importance[.]" S. Rep. No. 94-204, p. 9 (1975).

State district judges do not fit neatly into any of the categories on either side of the divide between three-judge court and one-judge court bodies, but in at least one respect, they fit the description of the kind of body intended to be covered by § 2284(a): even one district court sometimes "exercises its powers over the entire State,"[29] which is the Senate Report's specified condition requiring a three-judge court. *Id.* While Texas does not contend here that the federal trial court in this case lacked jurisdiction because it acted through one judge instead of three, it does seem that Congress would at least have taken note of the potential three-judge court implications of covering judges through amended section 2 had it intended to do so.

The need for unobstructed congressional debate

---

[29] The Supreme Court of Texas invalidated Texas's system of school finance. *See, e.g., Edgewood I.S.D. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The presiding trial judge, a Travis County district judge, has announced his intention to decide by April 15, 1991, whether to cutoff all state and local funds to public schools in Texas because of the state's failure to bring the school finance system into compliance with the Texas Constitution. *See* Dallas Morning News, April 2, 1991, § A, at 1 col. 4.

Congressional reaction to the foregone debate is unknowable, but that is not the point of reciting what Congress did not do. Each of the topics raises policy implications that one side or the other in this case tries to convert to its advantage in arguing whether the effects test in amended section 2 covers judicial elections. The arguments on these points are in reality arguments over whether the effects test *should* cover judicial elections. The Court should not have to forge these difficult policy debates into debates about the meaning of amended section 2 in the context of judicial elections. Instead, it should forthrightly confront them for what they are: indicators of what Congress would have confronted had it intended to address whether elected judicial systems should be subjected to the effects test. Congress's failure to confront them is yet another demonstration that it had no intention of reaching judicial elections through the effects route.

Inapplicability of the Section 5 Analogy

HLA, LULAC, and the Unites States try to buttress their section 2 coverage arguments by pointing to section 5. They argue that it undeniably covers judicial elections, that it must be read in tandem with section 2,[30] and that therefore section 2 also covers judicial elections.

The first and obvious response is that the provisions are different provisions, with different origins, different applications, and different repercussions. Section 5, for example, has included an effects test since the passage of the original Act in 1965. Thus, whether the application of the clear statement rule for judges to section 5 would

---

30 There is irony in this argument about the tandem nature of sections 2 and 5, given the United States' trial court position in *MABA* that section 5's prohibitions stand independent of court determination of the reach of section 2.

yield the same result -- that is, no "effects" coverage -- as the one yielded for amended section 2 would require an extensive review of the legislative history behind the original Act. Because the question of section 5's coverage of judicial elections is not before the Court in this case, such a review is unnecessary. It can await the appropriate case.

The Court's summary affirmances in section 5 cases involving elected state judges[31] do not by any stretch of statutory construction and application of precedent lead to the ineluctable conclusion that the "effects" arm of amended section 2 covers judges. As summary affirmances, they are authority only for a rejection of "the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Only the judgment of the court below is affirmed. *Anderson v. Celebrezze*, 460 U.S. 780 n.5 (1983). Thus, *Brooks* and *Haith* may have rested on assessments of whether the record below supported a finding of intentional discrimination. They could not have rested on opinions about whether the clear statement rule had been satisfied in the 1965 enactment of Section 5 and its supporting legislative history because the question was not directly presented to the Court in the jurisdictional statements.

The Court must evaluate the reach of section 2's effects test on its own terms, not on section 5's terms. The Court must look to congressional intent concerning section 2 in 1982, not to congressional intent concerning section 5 in 1965. There is time enough to evaluate section 5's reach, and the principles adopted in this case

---

31 *Georgia State Board of Elections v. Brooks*, Civ. No. 288-146 (S.D. Ga. 1989), *aff'd*, 111 S.Ct. 288 (1990) ("*Brooks*"); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) ("*Haith*").

should provide at least broad guidance in conducting that evaluation.

Other Protections for Minority Voters in Judicial Elections

Application of the clear statement rule to hold that the effects test of amended section 2 does not apply to state judicial elections would not leave minority voters unprotected in the exercise of their franchise in judicial elections. First, and most obviously, Congress could react to the ruling just as swiftly as it did to *Bolden*. With this scenario, Congress could debate and enact standards in advance of any challenge to elected judicial systems, instead of this Court having to impose them after the trial is over, with virtually no guidance from Congress on how to treat the conceded uniqueness of state judiciaries.

In the meantime, both the Constitution and the Voting Rights Act would continue to offer significant protections to minority voters in judicial elections. The Fourteenth and Fifteenth Amendments, as well as the intent prong of amended section 2, still would prohibit intentional acts of official racial discrimination against those seeking to exercise their franchise in judicial elections. The Act retains major protections for those seeking to exercise their franchise when electing judges. These protections include ballot access, inhibitions on the reinstitution of the poll tax, and preclearance of various electoral changes, including (while *Haith* and *Brooks* remain governing authority) those changes affecting judicial elections.

Conclusion: The Insufficiency of Congressional Inadvertence

The Court has applied the clear statement rule to deny extraterritorial application to a federal antidiscrimination statute whose broad terms otherwise would have reached that far. *EEOC v. Arabian American*

Oil Co., __ U.S. __ (March 26, 1991) (No. 89-1838) ("*Aramco*"). The Court held that Title VII did not regulate the employment practices of United States employers employing United States citizens abroad.

The clear statement rule, which determined *Aramco's* result, is employed "to protect against unintended clashes between [American] laws and those of others nations which could result in international discord." __ U.S. at __, slip op. at 3. Texas seeks no more than the application in this case of the analogue of the *Aramco* principle. Surely it is as important to prevent *unintended* clashes between federal laws and core state functions as it is to prevent such clashes between American laws and the laws of Saudi Arabia. In fact, there is an even stronger constitutional basis for regulating unintended clashes between federal and state governments, as the discussion above indicates.

Congressional inadvertence may not be the basis for radically and irretrievably restructuring a state judicial system that is more than a century old. Governing statutory construction principles, grounded in fundamental precepts of judicial review and federalism, require conscious congressional choice here. The choice ultimately may be for Congress to do precisely what the petitioners seek, but it must be a choice Congress confronts, not avoids. Congressional silence thus far on the question presented here means that the answer to the question must be that the effects test of amended section 2 does not apply to elected state judicial systems.

II.

TEXAS DISTRICT JUDGES HOLD SINGLE-MEMBER OFFICES, AND ELECTING THEM COUNTYWIDE IS NOT A DILUTIVE ELECTORAL PRACTICE COVERED BY AMENDED SECTION 2

This case was brought, tried, and decided under the *Gingles* framework as a vote dilution challenge to an at-large multimember electoral system. *Gingles* commands the conclusion that such challenges cannot be established under the effects test of amended section 2 when the official elected under the system is a solo governmental decisionmaker. Trial judges are solo decisionmakers, even when the electorate chooses more than one to serve the same geographical unit. Thus, regardless of whether other section 2 claims may be established against Texas's system for electing its district judges, a section 2 *vote dilution* claim may not.

The Solo Decisionmaker Argument Does Not Create An Exemption From Section 2

The petitioners mischaracterize the solo decisionmaker argument made by Texas and adopted in the five-member concurrence by Judge Higginbotham. It is not an effort to carve an exception for state district judges from amended section 2.[32] It is at least conceivable that section 2 claims other than those arguing vote dilution might be established against the judicial electoral system. *But see* Part I, *supra*.

Instead of an effort to obtain a statutory exception, the solo decisionmaker argument is a demonstration that the concept of vote dilution governed by the *Gingles*

---

[32] HLA mistakenly says it is. HLA Br. 34.

standard is not so protean that it applies to every system for electing public officials. *Gingles* recognizes the limits of its own applicability, observing that amended section 2 prohibits forms of voting discrimination other than just vote dilution. 478 U.S. at 45 n.10. It also is careful to explain that its standards are not necessarily applicable beyond the confines of vote dilution challenges to at-large multimember electoral systems. *Id.*, at 46 n.12.

Discerning the difference between the inapplicability of the vote dilution concept in this setting (Texas's argument) and the effort to carve out a wholesale exemption from amended section 2 for solo decisionmakers (the mischaracterization of Texas's argument) is crucial to this part of the case. It is a prerequisite to understanding why the countywide election of state district judges cannot violate vote dilution principles embedded in amended section 2.

District Judges Are Solo Decisionmakers

The first step in the solo decisionmaker analysis is obvious. Are the officials elected under the challenged electoral system solo decisionmakers? The answer here is easy. The district court determined that the officials targeted in this case are. The Chief Justice of the Supreme Court of Texas, himself a former Texas district judge in Harris County, testified to the solo decisionmaking nature of the office of trial judge and explained that Texas district judges engage in collegial decisionmaking only for administrative functions incidental to the performance of their judicial functions. Tr. 5-81.[33]

---

33 The district judges in some counties use Tex. R. Civ. P. 330 to implement a shared, or common, docket. This hardly converts the trial judges into collegial decisionmakers. In any given case, only one judge at a time decides any given issue.

In another context, the Court confirms the view of the solo nature of trial judge decisionmaking that the record in this case reflects. In *Salve Regina College v. Russell*, __ U.S. __ (March 20, 1991) (No. 89-1629), the Court contrasted the "functional components of decisionmaking" of district courts and appellate courts: "[d]istrict judges presid[ing] alone" compared to the "collaborative juridical process" and the "collective judgment" of multi-judge appellate panels.

The Connection of the Vote Dilution Concept to the Function of the Elected Office

There really being no question but that state district judges are solo decisionmakers, the other question in this analysis must be answered. What difference does it make that a vote dilution challenge is lodged against an at-large system for electing solo decisionmakers instead of one electing collegial decisionmakers? The difference lies in the origins of the concept of vote dilution and the first threshold requirement in *Gingles* for establishing an at-large vote dilution case -- whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district, 478 U.S. at 50.

The modern concept of vote dilution originated with the landmark case of *Reynolds v. Sims*, 377 U.S. 533 (1964) ("*Reynolds*"), in which the Supreme Court sustained a constitutional attack on the apportionment of the Alabama legislature. In adopting the 1982 amendments to section 2, Congress traced the lineage of racial vote dilution claims directly to *Reynolds*. *See* S. Rep. No. 97-417, p.196 (1982).[34] The interrelationship

---

34 "The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*."

of the concept of vote dilution and collective decisionmaking lies at the core of the opinion's rationale:

> [I]t would seem reasonable that a majority of the people . . . could elect a majority of . . . legislators. . . . Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are *collectively responsible* to the popular will.

377 U.S. at 565 (emphasis added). Sympathetic commentators have used *Reynolds* as a reference point to argue that courts assessing vote dilution claims should look beyond the casting of ballots to the decisionmaking function of those elected by the voters. *See* Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L.REV. 173, 180 (1989) ("*Maps and Misreadings*").[35]

Texas urges a similar focus. Courts reviewing vote dilution challenges must consider the decisionmaking function of the official whose election is targeted. Another way of stating the point is that vote dilution analysis must take into account the relationship between the voters and the purpose for which they are electing their representatives. When those representatives engage in solo decisionmaking instead of collegial decisionmaking, the concept of vote dilution is inapplicable.

---

35 The same commentator continues the same tack in a more recent article, Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L.REV. 1 (1991). She argues that a court faced with a section 2 challenge must consider whether the targeted position is one whose power is exercised by a single official and whether it is "functionally necessary" that the single official exercise it. *Id.*, at 21.

Role of the First *Gingles* Factor in the Liability Phase

Turning to *Gingles'* role in this analysis, it is clear that the paradigmatic remedy under its first threshold factor is single-member districts. *See, e.g.*, 478 U.S. at 50 n.17 (explaining the theoretical basis for the first factor). Moreover, because the first *Gingles* factor is a threshold factor at the *liability phase* of a vote dilution case under amended section 2, it does not matter whether the remedy phase (if it is reached at all) culminates in an agreed remedy that uses alternative voting mechanisms to solve the problem or a court-ordered remedy that uses different single-member districts than the ones used to satisfy the first liability factor.

Making single-member districts the paradigmatic remedy at the liability phase and satisfaction of the first factor a prerequisite to proceeding further in the analysis means that remedy in vote dilution cases moves from the end of the line to the front of the line. The lower courts have recognized this consequence of the *Gingles* gloss on amended section 2. *See, e.g., McGhee, supra*, 860 F.2d at 120 (in vote dilution cases, "right and remedy are inextricably bound together"). The Seventh Circuit explains the rationale for this aspect of the *Gingles* approach:

> The Court's approach, by focusing up front on whether there is an effective remedy for the claimed injury, . . . reins in the almost unbridled discretion that section 2 gives the courts[.]"

McNeil v. Springfield Park District, 851 F.2d 937, 942 (7th Cir. 1988).

Transporting the paradigmatic remedy of single member districts to the beginning of the liability phase of a vote dilution case is of fundamental significance to the

solo decisionmaker argument. To understand why, it is necessary to explain why the state retains the authority to make the initial policy choice about the basic unit that is to form the community to be governed by its elected officials.

Integrity of States' Basic Political Arrangements

The Act itself recognizes that states retain the authority to establish the basic electoral framework and the types and configurations of the communities whose voices are to be heard in the process of representative democracy. The prohibitions of section 2 reach states and their "political subdivision[s]," and the Act specifies a definition of "political subdivision," 42 USC § 1973*l*(c)(2). *Gingles* emphasizes that vote dilution inquiries are "district specific," 478 U.S. at 59 n.28, and Judge Higginbotham's concurrence reasons that:

> It is implicit in Gingles that the effect of election practices must be considered after taking the underlying definition of the offices of state government as given. . . . Section 2 does not grant federal courts the authority to disregard the states' basic arrangements.

Pet. App. 103a-104a.

The recognition in the Act and *Gingles* of the states' essential authority to configure their political subdivisions into communities of representative government is consistent with the fountainhead case, *Reynolds*, which stated:

> Political subdivisions of States -- counties, cities, or whatever -- . . . have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the

> Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, . . . these governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercise rests in the absolute discretion of the state."

377 U.S. at 575.

How Single Member Districts Fragment the Community Represented by Solo Decisionmakers

For over a century, Texas has chosen the county as the basic unit for electing district judges. It has used the same county unit to elect its county commissioners, who function through the commissioners court (a non-judicial body) as a collective decisionmaking body. Electing county commissioners from single-member districts does not destroy the integrity of the unit because the community living within the unit remains intact, so to speak, with each decision by the commissioners court. Electing state district judges from single member districts would destroy the integrity of the unit because each independently-made decision by the trial judge would exclude from ultimate participation all the voters in the districts not represented by the judge.[36]

More broadly speaking, this is to say that single member districts do not alter the basic nature of collective decisionmaking bodies. At the end of the decisionmaking process, every voter of the community will have participated through his or her representative. In this way in a representative democracy, each voter's

---

36 Judge Higginbotham's concurrence outlines an example of the exclusionary consequences of such an arrangement. Pet. App. 106a-107a.

vote counts each time a decision is made. Minority voters who otherwise might be effectively excluded from the entire process because of the submergence of their vote by a bloc of Anglo majority voters have their voice heard in each decision.

The same is not true with regard to elected solo decisionmakers, even if more than one of them is elected from the same geographic area. The imposition of a single member districting scheme on an electoral system in which more than one solo decisionmaker is elected from the same political unit to perform the same type of function results in a balkanization of the political unit. The decisionmaking becomes fragmented along the same lines as the districts into which the unit is carved. It is no longer the community's collective decisionmaking. At the end of the decisionmaking process, only a portion of the voters in the community will have participated through their elected representative. This result is antithetical to the initial choice made by the state, which under the Act and the *Reynolds* rationale is sacrosanct.

Thus, if it is apparent at the liability phase of a vote dilution case that imposition of the paradigmatic single member remedy will alter the basic nature of the elected office, then no vote dilution claim can be made out. This is Texas's solo decisionmaker argument.

Irrelevancy of Alternative Remedies

The argument is not blunted by assertions that other remedies, such as limited voting mechanisms, are available which might not splinter the basic unit of representation and governance. Only by retreating from *Gingles* can the Court assign this question to the remedy phase of the case, instead of requiring its confrontation in the liability phase. Adopting HLA's argument on this point would be inconsistent with the first *Gingles*

factor.[37] The Court should adhere to *Gingles* and hold that a section 2 vote dilution claim is conceptually inapplicable to an at-large system for electing solo decisionmakers.

CONCLUSION

The legitimacy of the petitioners' ultimate objectives in this case are not called into question if the Court effectively returns the issue to Congress for it to give, for the first time, serious attention to the serious issues presented when federal courts are asked to restructure something so fundamental as a state's judicial system. Congress may deploy its enforcement powers under the Civil War Amendments only after it has deliberated over a matter. There has been no congressional deliberation.

Texas urges the Court to affirm the judgment of the Fifth Circuit for the reasons set forth in this brief. Should the Court reverse the judgment, it should remand the case to the Fifth Circuit for further proceedings consistent with the Court's decision.

---

[37] Some scholarly criticism has been leveled at *Gingles'* imposition of the geographic compactness requirement as a threshold vote dilution issue. Significantly for the solo decisionmaker issue involved in this case, a central element of the criticism is its emphasis on the importance of minority representation in collegial decisionmaking bodies. *Maps and Misreadings, supra*, for example, stresses what it terms the "qualitative" aspect of vote dilution which should take into account the beneficial concept of "civic inclusion." Interestingly, its depiction of the values of civic inclusion make sense only in collegial decisionmaking settings. *See, e.g., Maps and Misreadings*, at 216-17 (discussing the importance of ongoing relationships among members of a representative body and of legislative coalition building).

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

RENEA HICKS*
Special Assistant Attorney General

JAVIER GUAJARDO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085
Attorneys for State Respondents
* *Attorney of Record*

April 8, 1991